

NATIONAL ARBITRATION PANEL

In the Matter of Arbitration)	GRIEVANT: C. Hernandez
))	
between)	
))	
AMERICAN POSTAL WORKERS UNION)	POST OFFICE: Phoenix, AZ
))	
and)	
))	
UNITED STATES POSTAL SERVICE)	CASE NO. H1C-5K-C 24191

BEFORE: Professor Carlton J. Snow

APPEARANCES: Mr. Martin I. Rothbaum

Mr. C. J. "Cliff" Guffey

PLACE OF HEARING: Washington, D.C.

DATE OF HEARING: December 11, 1990

POST-HEARING
BRIEFS: March 4, 1991

history" (See, 120 Cong. Rec. 30531, 30534 (Sept. 10, 1974). In other words, the definition of a disability under ADA extends to an individual who had an impairment in his or her life and who, then, recovered from the disability. The new legislation prohibits discrimination against such individuals.

The Americans with Disabilities Act also covers individuals who are "regarded" as having an impairment. In other words, even if an individual has a physical impairment that does not substantially limit a significant life activity, but the person has been treated by the employer as though the person had such a limitation, that person is protected by the legislation. (See, 45 C.F.R. § 84.3(j)(2)(iv) (1989)). That is, the new legislation prohibits discrimination against a person who has been treated by the employer as though the individual were impaired. (See, School Board of Nassau County v. Arline, 480 U.S. 273 (1987)).

It is important to recognize that an impairment under the ADA must not be of any particular duration. In other words, a person with a temporary impairment would be covered by the legislation. One need only establish an impairment that substantially limits a major life activity. It would be possible to establish coverage under the legislation without regard to the duration of the impairment.

If a worker is a qualified individual with a disability, management has an obligation to make a reasonable accommodation for that person. The legislation states that the

employer commits discrimination by

not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation or business of such covered entity. (See, ADA § 102(b)(5)(A), 104 Stat. 332).

Section 101(9) of the legislation defines "reasonable accommodation" to include job restructuring as well as modifying work schedules. It is clear from the legislative history for the Act that the intent of the drafters was for management to make a determination about a specific accommodation on the basis of particular facts for individual cases. (See, Senate Rep. 116, 101 1st Cong., 1st Sess. 26, 31 (1989)). Legislators expected that management would be flexible with regard to job restructuring and modifying schedules. (See, Sen. Rep. 31). Legislators were clear about the fact that, even if the job restructuring or modified schedule reduced efficiency of an operation, it must be made, unless the inefficiencies could be defined as an "undue hardship" in specific cases.

The point is that the Employer has an obligation to look to laws such as the Americans with Disabilities Act for general guidance about the nature of the Employer's obligation to provide reasonable accommodation for individuals who are impaired. The Employer's obligation extends to all employment decisions. Decisions must be made on a case-by-case basis looking at the facts of each specific problem. The legislation suggests that the Employer must use a problem

solving approach to the matter. This means management must identify aspects of the job that limit the person's performance; determine potential accommodations; evaluate the reasonableness of the alternative accommodations in terms of their impact on the employer; and, assuming no undue hardship on the employer, implement the most effective accommodation. (See, e.g., Davis v. Frank, 711 Fed. Supp. 447 (N.D. Ill. 1989)).

Management's authority to assign overtime work must be understood within the context of laws such as the Americans with Disabilities Act. The Employer's authority to order overtime is not unfettered, and such overtime assignments cannot be viewed as an implied part of every job description. Management's right to require overtime of employees must be understood not only within the context of the parties' contractual agreement but also as informed by relevant legislation. Those sources make clear that the right of management to require overtime does not translate into an implied or inherent qualification for every postal position.

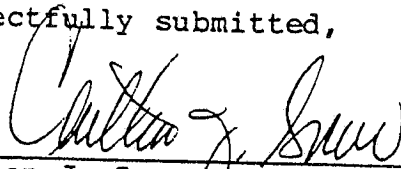
AWARD:

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer violated Article 37 of the National Agreement when, on approximately March 28, 1984, management denied the grievant a bid assignment due to her inability to work overtime. Because the grievant was the senior bidder for the open position and met all published qualification standards, she should have been awarded the position. An inability to work overtime does not necessarily prohibit an employee from performing his or her normal assignment. Accordingly, such an individual working with such a restriction is not necessarily on "light duty." Employees restricted from working overtime may bid on and receive assignments for which they can perform a regular eight hour assignment. The parties did not intend the 1987 Memorandum of Understanding to control individuals who are unable to work overtime but have no other medical restrictions.

The parties shall have sixty days from the date of this report to negotiate a remedy for the specific grievant involved in the case. If they are unable to accomplish this objective, they, by mutual agreement, may activate the arbitrator's jurisdiction any time during the ninety days period following the date of this report or by the request of either party after sixty days have passed from the date of this report but expiring ninety days after the date of this report. Further evidentiary hearings might be necessary

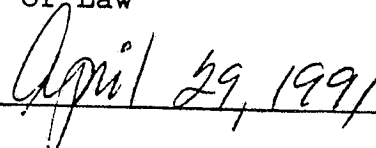
in order for the arbitrator to fashion an appropriate
remedy. It is so ordered and awarded.

Respectfully submitted,



Carlton J. Snow
Professor of Law

Date:





UNITED STATES POSTAL SERVICE
475 L ENFANT PLAZA SW
WASHINGTON DC 20260

Mr. Cliff J. Guffey
Assistant Director
Clerk Craft Division
American Postal Workers
Union, AFL-CIO
1300 L Street, N.W.
Washington, DC 20005-4128

Re: HOC-3W-C 10914
Class Action
Mid Florida FL 32799

Dear Mr. Guffey:

On February 25, 1993, we met to discuss the above-captioned grievance at the fourth step of our contractual grievance procedure.


The issue in this grievance is whether management violated the National Agreement by requiring injured employees to sign a "Notice to Injured Worker; Limited Duty Assignment Policy."

During our discussion, we mutually agreed that employees will not be required to sign a notice such as the one referenced in this grievance.

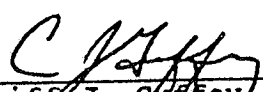
Please sign and return the enclosed copy of this decision as your acknowledgment of agreement to remand this case to the parties at Step 3 for application of the above understanding.

Time limits were extended by mutual consent.

Sincerely,



Daniel P. Magazyn
Grievance and Arbitration
Labor Relations



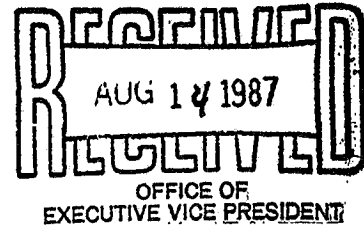
Cliff J. Guffey
Assistant Director
Clerk Craft Division
American Postal Workers
Union, AFL-CIO

Date: 4-7-93



UNITED STATES POSTAL SERVICE
Labor Relations Department
475 L'Enfant Plaza, SW
Washington, DC 20260-4100

August 14, 1987




Mr. William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO
1300 L Street, N.W.
Washington, DC 20005-4107

Dear Mr. Burrus:

Enclosed is a Memorandum of Understanding that relates to temporarily physically disqualified employees.

Both parties agreed that this memorandum in no way prejudices the position of either party on any dispute as to accommodation of qualified handicapped employees.

Sincerely,


George S. McDougald
General Manager
Grievance and Arbitration
Division

Enclosure

MEMORANDUM OF UNDERSTANDING
BETWEEN
THE AMERICAN POSTAL WORKERS UNION, AFL-CIO
AND
THE UNITED STATES POSTAL SERVICE

It is agreed that the following procedures will be used in situations in which an employee, as a result of illness or injury or pregnancy, is temporarily unable to work all of the duties of his or her normal assignment. Instead, such an employee is working on:

- 1) light duty,
- 2) or limited duty;

Or is receiving:

- 1) Continuation of Pay (COP)
- 2) or compensation as a result of being injured on the job
- 3) sick leave
- 4) annual leave in lieu of sick leave
- 5) or Leave Without Pay (LWOP) in lieu of sick leave

I. Bidding

A) An employee who is temporarily disabled will be allowed to bid for and be awarded a preferred bid assignment in accordance with the provisions in the various craft articles of the Agreement, or where applicable, in accordance with the provisions of a local Memorandum of Understanding, provided that the employee will be able to fully assume the position within six (6) months from the time at which the bid is submitted.

B) Management may, at the time of submission of the bid or at any time thereafter, request that the employee provide medical certification indicating that the employee will be able to fully perform the duties of the bid-for position within six (6) months of the bid. If the employee fails to provide such certification, the bid shall be disallowed, and, if the assignment was awarded, the employee shall become an unassigned regular and the bid will be reposted. Under such circumstances, the employee shall not be eligible to re-bid the next posting of that assignment.

Mr. William Burrus

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C) If at the end of the six (6) month period, the employee is still unable to fully perform the duties of the bid-for position, management may request that the employee provide new medical certification indicating that the employee will be able to fully perform the duties of the bid-for position within the second six (6) months after the bid. If the employee fails to provide such new certification, the bid shall be disallowed and the employee shall become an unassigned regular and the bid will be reposted. Under such circumstances, the employee shall not be eligible to re-bid the next posting of that assignment.

D) If at the end of one (1) year from the submission of the bid the employee has not been able to fully perform the duties of the bid-for position, the employee must relinquish the assignment, and would then become an unassigned regular and not be eligible to re-bid the next posting of that assignment.

E) It is still incumbent upon the employee to follow procedures in the appropriate craft articles to request notices to be sent to a specific location when absent. All other provisions relevant to the bidding process will also apply.

F) If the bid is to an assignment that has other duties or requirements more physically restrictive or demanding than the employee's current assignment which, at the time of bidding, the employee cannot perform as a result of temporary physical restrictions, the employee's bid will not be accepted.

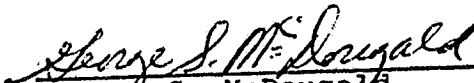
G) If the employee is designated the senior bidder for an assignment which requires a deferment period, the employee must be physically capable of entering the deferment period at the time of the bid and completing it within the time limits set forth in the applicable provisions of the National Agreement. Further, if the employee qualifies during the deferment period the employee must be capable of immediately assuming the duties of the assignment in accordance with all the provisions set forth in this Memorandum of Understanding. In accordance with this provision, if the assignment requires the demonstration of a skill(s), the employee must be able to demonstrate the skill(s) on the closing date of the posting.

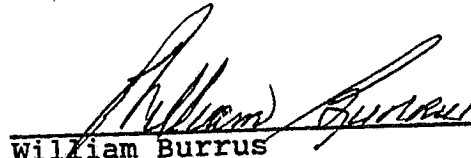
Mr. William Burrus

II. Higher Level Pay

Employees who bid to a higher level assignment pursuant to the procedures described in the preamble and Part I, Bidding, above, will not receive higher level pay until they are physically able to, and actually perform work in the bid-for higher level position.

Sincerely,


George S. McDougald
General Manager
Grievance and Arbitration
Division
Labor Relations Department
United States Postal Service


William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO

9.1.87
DATE



American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

William Burrus
Executive Vice President
(202) 842-4246

September 21, 1987

TO: Resident Craft Officers and Business Agents
SUBJECT: Memorandum of Understanding
(Physically Handicapped Employees)

National Executive Board
Moe Biler, President

William Burrus
Executive Vice President

Douglas C. Holbrook
Secretary-Treasurer

Thomas A. Neill
Industrial Relations Director

Kenneth D. Wilson
Director, Clerk Division

Ed I. Wevodau
Director, Maintenance Division

Donald A. Ross
Director, MVS Division

George N. McKeithen
Director, SDM Division

Norman L. Steward
Director, Mail Handler Division

Regional Coordinators
Raydell R. Moore
Western Region

James P. Williams
Central Region

Philip C. Flemming, Jr.
Eastern Region

Romualdo "Willie" Sanchez
Northeastern Region

Archie Salisbury
Southern Region

I am enclosing a copy of the recently signed agreement permitting light and limited duty employees as well as employees on maternity leave or other medical leave to bid for vacant assignments. The basic protections of the agreement are as follows:

1) The agreement does not waive or resolve the question of the USPS' obligation to modify assignments to accommodate qualified handicapped employees. Employees who will not recover from medical disabilities should not be denied the opportunity to bid and be awarded an assignment. Appeals from denial of such rights should be processed under Article 2 or through EEO.

2) Employees bidding are not required to submit medical certification unless specifically requested by management and such request may be made once at the time of the bid or during the initial 6 months and once during the second 6 months.

3) Employees declared senior bidder and meet any prerequisite skills required will be declared the successful bidder and placed in the new assignment even though the employee's medical condition may prevent physical placement into the duties of the new assignment. In such circumstances the employee will continue on light or limited duty, or on leave pending recovery; either way the employee will be awarded the new assignment provided that a medical statement has been provided, if requested.

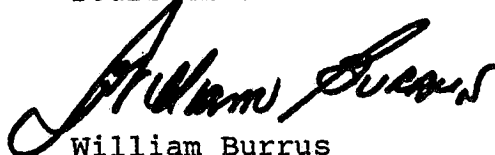
4) This agreement does not protect the right to bid to a position that requires physical activity more

demanding than the specific duties of the current position that the employee cannot perform due to medical restrictions. Only those duties of the current assignment that are directly related to the medical limitations can be used for consideration of "more physical restrictive or demanding."

5) If the assignment requires a deferment period the employee must train and qualify within the required time frame and must submit medical documentation as requested within the first and/or second 6 month period.

6) Employees designated successful bidder to higher level positions will continue to receive the former rate of pay until they begin performing the higher level duties. Once an employee begins receiving the higher level pay, all subsequent leave is paid at the higher level.

Yours in union solidarity,



William Burrus
Executive Vice President

WB:rb
opeiu#2
afl-cio

Enclosures